No. 17-9572

# In The
# Supreme Court of the United States

CURTIS FLOWERS,

*Petitioner,*

versus

STATE OF MISSISSIPPI,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Mississippi**

## BRIEF FOR RESPONDENT


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## QUESTION PRESENTED

DID THE MISSISSIPPI SUPREME COURT ERR IN HOW IT APPLIED *BATSON V. KENTUCKY*, 476 U.S. 79 (1986)?

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## BRIEF FOR RESPONDENT

This matter is before the Court on the grant of a writ of certiorari from the decision of the Supreme Court of Mississippi in the case of Curtis Flowers (hereinafter "Flowers"). Specifically, the Supreme Court of Mississippi affirmed the conviction of capital murder and sentence of death imposed upon Flowers by the Circuit Court of Montgomery County, Mississippi, and Flowers seeks relief from that judgment. The Respondent, State of Mississippi (hereinafter "the

State"), respectfully submits Flowers is not entitled to any relief, whatsoever, from this honorable Court.

## OPINION BELOW

The lower court's affirmance of Flowers' conviction and sentence is reported at *Flowers v. State*, 240 So.3d 1082 (Miss. 2017), *cert. granted in part*, 139 S.Ct. 451 (2018) (Joint Appendix ("J.A.") 299-526).[1]

## JURISDICTION

The order granting the writ of certiorari in this case instructed as follows, "Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to the following question: Whether the Mississippi Supreme Court erred in how it applied *Batson v. Kentucky*, 476 U.S. 79 (1986), in this case." The Court's jurisdiction of this appeal is provided in 28 U.S.C. § 1257(a) (2012).

[1] "J.A." references the Joint Appendix. "C.P." and "Tr." reference the Clerk's Papers and Trial Transcripts, respectively, which were submitted to the Mississippi Supreme Court in support of Petitioner's appeal of his conviction and sentence of death in his sixth trial.

## CONSTITUTIONAL PROVISIONS INVOLVED

Flowers seeks to invoke the Sixth and Fourteenth Amendments to the Constitution of the United States. He fails to do so.

## STATEMENT OF THE CASE

This case arises from the July 16, 1996, execution-style murders of Bertha Tardy, Robert Golden, Derrick Stewart and Carmen Rigby, at the Tardy Furniture store in the city of Winona, Montgomery County, Mississippi. In 1997, Petitioner, Curtis Flowers, was indicted for the capital murders of Tardy, Golden, Stewart and Rigby, with the underlying felony of robbery, pursuant to Mississippi Code Annotated § 97-3-19(2)(e).

A special venire was drawn on April 20, 2010. Tr. 348. Pretrial hearings in this case took place on April 20, 2010, and June 4, 8-9, 2010. On April 20, 2010, the court heard argument and testimony regarding Petitioner's Motion for Disclosure and Supplementation of Discovery. The court heard argument on Petitioner's Motion to Bar Retrial Under the Double Jeopardy Clause of the Mississippi Constitution. Tr. 443-46. Petitioner renewed his speedy trial motion, with no further argument. Tr. 446. Flowers urged the trial court to reconsider its ruling on the Motion for Recusal of Circuit Court Judge. Tr. 454. The court also heard argument on Petitioner's Supplemental Motion to Preclude Death Penalty Procedure, and Petitioner's

Vindictiveness Misconduct Motion. Tr. 458. The court also heard argument on Petitioner's Notice of Renewal and Adoption of Motions from the Previous Five Trials. Tr. 463. Finally, the court heard argument on Petitioner's Motion for Setting of Reasonable Bail. Tr. 470.

Prior to the commencement of voir dire, on June 4, 2010, the court granted the State's Motion to Quash the subpoena of the assistant district attorney, which defense counsel issued in order to prevent the ADA from participating as an attorney for the State during Flowers' trial. Tr. 560, 565. The court also granted the State's motion to compel the summary report of proposed defense expert witness Robert Johnson. Tr. 566-67.

On June 4, 2010, jury selection began in the Montgomery County Circuit Court, the Honorable Joseph A. Loper, Jr., presiding. On June 8, 2010, Petitioner renewed his motion to bar imposition of the death penalty in this case, on the basis of racial discrimination by the State and vindictiveness by the prosecutor. Tr. 1096, 1098. Petitioner also renewed his Motion to Bar Any Retrial Under the Double Jeopardy Clause. Tr. 1102-03.

After jury selection and trial, on June 18, 2010, the jury returned verdicts finding Flowers guilty of the capital murders of Tardy, Rigby, Golden and Stewart. Tr. 3245. That same day the Circuit Court proceeded into the sentencing phase of the trial. On June 19, 2010, the jury returned the following:

We, the jury, unanimously find from the evidence beyond a reasonable doubt, that the following facts existed at the time of the capital murder:

1. That the defendant actually killed Bertha Tardy.
2. That the defendant attempted to kill Bertha Tardy.
3. That the defendant intended the killing of Bertha Tardy.
4. That the defendant contemplated that lethal force would be employed.

We, the jury, unanimously find that the aggravating circumstances of:

1. The defendant knowingly created a great risk of death to many persons
2. Capital offenses were committed while the defendant was engaged in the commission of armed robbery for pecuniary gain
3. Capital offenses were committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody

exists beyond a reasonable doubt and is sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and we further find

> unanimously that the defendant should suffer death.
>
> Barron N. Davis
> Foreman of the Jury

The jury made the same findings and returned the same judgment with respect to the other victims Rigby, Golden and Stewart. Tr. 3480, C.P. 2925-2929.

On August 4, 2010, the trial court denied Flowers' Motion for a New Trial and Motion for Judgment Notwithstanding the Verdict. Flowers appealed that decision, represented by the Mississippi Office of the State Public Defender, Capital Defense Counsel Division. The Petitioner raised the twelve (12) claims of error for the Mississippi Supreme Court's consideration. Of primary significance in this case is the assertion of error raised by Flowers in claim number VI., in which the Petitioner asserted that:

> The jury selection process, the composition of the venire and the jury seated, and pervasive racial and other bias surrounding this matter violated Flowers's [sic] fundamental Constitutional rights protected by the Sixth and Fourteenth Amendments.

The lower court subsequently affirmed Flowers' convictions and death sentence in *Flowers v. State*, 158 So.3d 1009 (Miss. 2014) (*Flowers VI*). Flowers then filed a petition for a writ of certiorari with the Court. In *Flowers v. Mississippi*, 136 S.Ct. 2157 (2016), the Court granted Flowers' petition, vacated the Mississippi Supreme Court's judgment in *Flowers VI*, and

remanded the case for further consideration in light of *Foster v. Chatman*, 136 S.Ct. 1737 (2016). Following the GVR remand, the Mississippi Supreme Court issued an opinion, once again affirming the trial court's holding. J.A. 299. From that decision, Flowers seeks relief with this Court.

## SUMMARY OF THE ARGUMENT

In the case *sub judice*, the State did not engage in racial discrimination during jury selection; nor were Petitioner's constitutional rights violated as the result of racial bias.

1. Peremptory strikes challenged on *Batson v. Kentucky*, 476 U.S. 79 (1986), grounds proceed as follows. As an initial matter, a defendant must establish a prima facie case of discrimination in the selection of jury members. Once a prima facie case is established, the State then bears the burden of providing racially neutral reasons for the challenged strikes. If the State gives racially neutral explanations, the defendant is allowed to rebut those explanations; if the defendant fails to provide rebuttal, the trial judge must then base his decision on those reasons given by the State. As part of that decisional process, a comparative analysis as it relates to the contested perspective jurors should be performed and was done here.

At the conclusion of that analysis, the trial court makes factual findings regarding the validity of the strikes. This Court will not disturb these findings

unless they are clearly erroneous. In considering such claims, the Court gives great deference to the fact finder's determination as to the validity of a strike.

2. Here, a special venire was called; approximately six hundred (600) individuals were called for voir dire on the first day of Petitioner's trial. Jury selection comprised thirteen hundred twenty-six (1326) pages of trial record; defense counsel asserted a *Batson* challenge after the State used a third peremptory strike against an African-American. J.A. 205. The trial court found that the use of five out of six peremptory challenges against African-American jurors was sufficient to raise a prima facie claim of discrimination under *Batson*.

The State used five peremptory strikes of African-American jurors and provided a valid race-neutral reason in support of each. Juror 14, Carolyn Wright, was sued by Tardy Furniture after the murders. Wright also worked with Flowers' father, Archie. J.A. 209, 215-16, 217-19. Juror 44, Tashia Cunningham, stated in her jury questionnaire that "she would not consider death or life." Cunningham was then "back and forth in questioning on what her opinion was on the death penalty," so much so that the State "could not keep her." J.A. 220. Cunningham also worked with Flowers' sister, Sherita Baskin, on an assembly line. *Id.* Cunningham stated that she "worked on the complete opposite end of the line" from Baskin, however, Cunningham's HR representative testified during voir dire that Cunningham and Baskin worked "right next to" each other "practically every day." *Id.*

Juror 45, Edith Burnside, stated that Flowers was "very good friends with both of her sons." J.A. 226. Ms. Burnside also was sued by Tardy Furniture. *Id.* Finally, Ms. Burnside "at one point said she could not judge." J.A. 227. Ms. Burnside stated the "fact that she knew the Defendant so well, he had visited in her home, and was such close friends with her sons might affect her decision in this case." *Id.* Juror 53, Flancie Jones, was related to Flowers. "She admitted that she was related—she was cousin—or the Defendant's sister, Angela Jones, is her niece." J.A. 229. Jones also was approximately thirty minutes late for court on two separate occasions. *Id.* Moreover, Ms. Jones was "back and forth all over the place on her opinion about the death penalty."[2] *Id.* She stated during voir dire that she was in favor of the death penalty; on her jury questionnaire she stated she was strongly against the death penalty. J.A. 229. When asked about that inconsistency, Jones admitted to lying on the questionnaire. *Id.* Finally, Juror 62, Diane Copper, worked with Flowers' father. J.A. 234. She also worked with Flowers' sister at a shoe

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[2] Flowers argues the State engaged in disparate questioning of black and white jurors, noting that the State asked more questions of the black jurors than the whites. However, the white jurors Flowers identifies each stated they would have no problem following the law and were able to impose either death or life. There was nothing for the State to question when the answers were satisfactorily clear. The State questioned jurors whose answers to the court were unclear or needed further elaboration. That the State failed to ask redundant questions, simply to meet the Petitioner's quota for equalized questioning, without more, does not indicate pretext.

store. *Id.* Moreover, she stated "that she leaned toward favoring [Flowers'] side of the case." *Id.*

3. As will be shown herein, the State's explanations were race-neutral and were not the product of pretext. Petitioner's claims that the State engaged in disparate treatment, tendering white jurors who had the same characteristics as black jurors are wholly unsupported by the record. The trial court's finding that Petitioner's *Batson* claims were devoid of legal merit was not error. Thus, the Mississippi Supreme Court did not err in its application of *Batson* to the case *sub judice* and did not err in affirming the trial court's holding. The Petitioner's claims to the contrary should be denied.

4. The record clearly shows these venire members were struck based on valid race-neutral reasons which were not the product of pretext. The record also supports the Mississippi Supreme Court's holding, affirming the trial court's finding that there was no disparate treatment in the State's actions, and that Petitioner failed to adequately rebut the legally accepted race-neutral reasons for striking these venire members. A review of the record with deference to the trial court's determination of these race-neutral reasons results in but one determination, that there were no *Batson* violations in the case *sub judice*. Thus, the Mississippi Supreme Court did not err in its application of *Batson*.

## ARGUMENT

### The Decision Of The Mississippi Supreme Court On The Issue Of Petitioner's *Batson* Claims Is Consistent With This Court's Holding In *Batson* And Is Thus Not A Decision Which Is Clearly Erroneous

In the case *sub judice*, the Court granted certiorari on the limited question of whether the Mississippi Supreme Court erred in how it applied *Batson*. In an attempt to establish *Batson* error, where there is none, the Petitioner argues that the "Mississippi Supreme Court failed to consider an important indicium of discriminatory intent and failed to evaluate the cumulative evidence of racial discrimination." Pet. 32. However, the crux of Petitioner's efforts rests on what transpired in the preceding five trials in this case, with particular emphasis on what transpired in *Flowers II*[3] and *Flowers III*.[4]

In that vein, the Petitioner avers that the Mississippi Supreme Court erred by failing to "mention" what transpired in Flowers' third trial with regard to *Batson* violations and to "assign [that trial] any weight in the assessment" of his current *Batson* claims under review. Pet. 33. Following this assignment of error, the Petitioner confesses that the "post-GVR Flowers VI majority acknowledged the historical fact of [the district attorney's] past discrimination. . . ." Pet. 34. In short, the Petitioner, on one hand, argues the

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[3] *Flowers v. State*, 842 So.2d 531 (Miss. 2003).

[4] *Flowers v. State*, 947 So.2d 910 (Miss. 2007).

Mississippi Supreme Court failed to consider past discrimination but on the other hand, admits the court considered past discrimination. To be clear, Petitioner's assertion that both the trial court and court below failed to take into account the events of Flowers' second and third trials is simply untrue and is an assertion unsupported by both the record and the Mississippi Supreme Court's opinion on the matter.

Flowers avers that the court below "failed to consider the cumulative evidence of discrimination." Pet. 38. The Petitioner concludes this argument saying there exists "[a]bundant evidence [which] supports an inference of purposeful discrimination." Pet. 39. The State Respondent disagrees and submits the record supports the decision of the Mississippi Supreme Court on this matter and does not constitute a decision which is clearly erroneous nor does it conflict with the Court's holding in *Batson*. Petitioner's claims were properly adjudicated pursuant to *Batson*. There are no errors or near errors to cumulate. Thus, he is entitled to no relief on his claims.

As the Court held in *Johnson v. California*, 545 U.S. 162, 170-71 (2005), "*Batson*, of course, explicitly stated that the [Petitioner] ultimately carries the 'burden of persuasion' to 'prove the existence of purposeful discrimination.' 476 U.S., at 93, 106 S.Ct. 1712 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967)). This burden of persuasion 'rests with, and never shifts from, the opponent of the strike.' *Purkett*, 514 U.S., at 768, 115 S.Ct. 1769." Flowers has not met his burden of persuasion in this regard.

Here, the trial court had the benefit of gauging the witnesses' and prosecutors' credibility at trial, meaning, "[d]eference is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations." *See Miller-El I, supra*, at 339, 123 S.Ct. 1029; *see also Hernandez, supra*, at 364, 111 S.Ct. 1859 (plurality opinion); *Batson, supra*, at 98, n.21, 106 S.Ct. 1712.

As stated *supra*, *Batson* requires a three-step process for adjudicating claims of racial discrimination in jury selection and that process was followed in the case at bar. "[A] defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (internal quotation marks and brackets omitted). *Batson's* third step, which is implicated in the case *sub judice*, hinges on the factual findings of the court below, findings which this Court gives due deference unless they are clearly erroneous.

Again, the Court accords great deference to the trial court in determining whether the offered explanation under the unique circumstances of the case is truly a race-neutral reason. As a result, the Court will not reverse factual findings on this issue "unless they

appear clearly erroneous or against the overwhelming weight of the evidence. One of the reasons for this is because the demeanor of the attorney using the strike is often the best evidence on the issue of race-neutrality." *Hernandez v. New York*, 500 U.S. 352, 365 (1991). A finding of discrimination thus largely turns on credibility.

Deference then insulates the trial court from appellate reversal absent findings which are clearly erroneous. As noted *supra*, once a prima facie showing has been established, the State bears the burden of providing a race-neutral explanation for the challenged strike. The State's explanations need not rise to the level of justification as required for a challenge for cause. "The issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 360 (1991).

As the Court pointed out in *Batson*, "there are any number of bases on which a prosecutor reasonably may believe that it is desirable to strike a juror who is not excusable for cause." 476 U.S. at 98, n.20. The State's reasons for a strike "need not be persuasive, or even plausible; so long as the reasons are not inherently discriminatory, they will be deemed race-neutral." *Rice v. Collins*, 546 U.S. 333, 338, 126 S.Ct. 969 (2006). That said, the State, in demonstrating the strike to be devoid of a "racially discriminatory purpose," must provide a "clear and reasonably specific explanation of his legitimate reasons for exercising the challenges" which

the State clearly did in this case. *Batson*, 476 U.S. at 98. It is then the opponent of the strike who bears the burden of rebutting that race-neutral reason, by arguing disparate treatment and pretext. Disparate treatment can certainly be a potential identifier of pretext. However, that alone is by no means determinative, especially in a case where, as here, additional questions were asked of black venire members, due to their responses during voir dire. Where, as here, the State demonstrated differences in the jurors' characteristics, there can be no disparate treatment shown. Again, once neutral reasons are offered and rebuttal is either provided or not, the trial court is then vested with substantial discretion in assessing whether facially neutral reasons for peremptory challenges to potential jurors are actually serving to mask hidden motivations in shaping a jury. Whether facially neutral reasons for peremptory challenges are accurate statements or pretext is a decision left solely to the discretion of the trial court.

*Batson* originally defined the three-step analysis required in a jury-discrimination challenge, but did not articulate a specific means of accomplishing the third step. *Batson*, 476 U.S. at 98. Rather, *Batson* held only that the trial court, once race-neutral reasons are articulated after a finding of prima facie discrimination, must determine if the defendant has established purposeful discrimination. In the wake of *Miller-El*, *Snyder*, *Foster* and others, the Court has expounded on the process for adjudicating a *Batson* challenge, yet has refrained from articulating a specific method for

carrying out steps two and three of the analysis. Indeed, the Court has stated, "[w]e adhere to the proposition that a state court need not make detailed findings addressing all the evidence before it." *Miller-El v. Cockrell*, 537 U.S. 322, 347, 123 S.Ct. 1029 (2003). Here, the record demonstrates the trial court did make those "detailed findings" in performing a comparative analysis of the contested strikes, detailing its findings at each step in that process.

### A. The Mississippi Supreme Court Committed No Error In Its Application Of *Batson* To Petitioner's Claims Of Racial Discrimination In Jury Selection

*Batson* requires a three-step process for adjudicating claims of racial discrimination in jury selection. "[A] defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S.Ct. 1203 (internal quotation marks and brackets omitted). *Batson's* third step, which is implicated in the case *sub judice*, hinges on the factual findings of the court below, findings which this Court gives due deference unless they are clearly erroneous. *Foster v. Chatman*, 136 S.Ct. 1737, 1747 (2016); *Snyder*, 552 U.S. at 477, 128 S.Ct. 1203. The Mississippi Supreme Court's holding

that the State did not engage in purposeful racial discrimination during jury selection and that Flowers' rights flowing from *Batson* were in no way violated, was not clearly erroneous. The record clearly supports that determination and thus, Petitioner's *Batson* claims must fail.

When voir dire began on June 7, 2010, the venire was comprised of sixty-seven (67) African-Americans and eighty-nine (89) whites. J.A. 372. On June 10, 2010, after conducting group and individual voir dire and excusing members for cause, eighteen (18) prospective African-American jurors remained at the beginning of the peremptory strike phase. *Id.* The State exercised five (5) strikes against the remaining pool of nineteen African-American jurors an exclusion rate of approximately 28% as compared to *Miller-El II's* 91% rate[5] and *Foster's* 100% rate.[6] Here, the prosecution's use of peremptory strikes was significantly and statistically lower than *Miller-El II*. However, numbers or percentages are part of the "totality of the relevant facts" the trial court is to consider; numbers alone do not constitute, "as a matter of law," a prima facie showing pursuant to *Batson*. *Batson*, 476 U.S. at 94. The Petitioner mischaracterizes the "numbers" with regard to the prosecution's strikes as the district attorney struck five (5) of the available eighteen (18) African-American jurors remaining, as opposed to five (5) out of six (6), as the Petitioner suggests. Pet. 40.

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[5] *Miller-El II*, 545 U.S. at 240-41.

[6] *Foster*, 136 S.Ct. at 1743.

In affirming the trial court, the Mississippi Supreme Court distinguished the case at bar from the Court's holding in *Foster*, noting that "*Foster* hinged on several apparent misrepresentations made by the prosecution" at trial, rather than a "prosecutor's history of adjudicated *Batson* violations." J.A. 362. At the outset, the State Respondent submits there are no such "smoking guns" with regard to evidence of racial animus, as was the case in both *Foster* and *Miller-El*.[7] Here there are no questionnaires, no juror notes and no district attorney files or any other tangible indicia of discriminatory intent, as was the case in both *Foster* and *Miller-El*.

Peremptory challenges, since their inception, have been utilized so "both the accused and the State [may] eliminate persons thought to be inclined against their interests—which is precisely how the traditional peremptory-challenge system operates." *See Holland v. Illinois*, 493 U.S. 474, 480, 110 S.Ct. 803 (1990). "Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of 'eliminating extremes of partiality on both sides,' thereby 'assuring the selection of a qualified and unbiased jury.'" *Id.* at 484 (quoting *Batson*, 476 U.S. at 91). The Petitioner, however, would seek to eliminate peremptory challenges altogether, at least, where the prosecution has committed any *Batson* violation in the past.

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[7] *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317 (2005) (*Miller-El II*).

The Petitioner's refrain at trial became a familiar one. Flowers argued that since the prosecuting attorney had been found to have committed a *Batson* violation in Petitioner's third trial, that by extension, was enough to automatically justify prohibiting the prosecutor from exercising peremptory strikes in his latest trial. Indeed, the Petitioner filed a motion to that effect. J.A. 3. The trial court properly denied the motion noting there was no precedent in support of such a request. The notion that a past *Batson* violation warrants relief automatically, in a subsequent trial, is one that is not supported by the precedent of this Court. That however, is the gist of Petitioner's arguments, that District Attorney Doug Evans should not have been allowed to exercise any peremptory strikes because in Flowers' third trial, he was determined to have committed a *Batson* violation. Petitioner cites to no relevant authority in support of this proposition, as there is none. The State Respondent submits the Petitioner misapprehends *Batson* and its progeny.

The Petitioner's relief from the *Batson* violation which occurred in his third trial was to obtain a new trial. Having availed himself of that relief, he cannot now obtain the same relief in his present case, based on what happened then. Rather, any potential relief must be confined to the events of this, his most recent conviction and sentence. Nevertheless, that is precisely what Flowers asks this Court to do, to resolve his *Batson* violation in his favor, based on what happened in his third trial. The Mississippi Supreme Court declined to extend him that courtesy and so should this Court. *Batson* simply does not support such a

conclusion, that past events categorically dictate present action and are dispositive. The Court has held that those past events should however, be considered, as they bear upon the issue. Indeed, that is the precise procedure which occurred here. Both the trial court and the Mississippi Supreme Court took those past events into consideration in their respective adjudications of the Petitioner's *Batson* claims.

As the Court held in *Foster*, "in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." 136 U.S. at 1748 (quoting *Snyder*, 552 U.S. at 478, 128 S.Ct. 1203). Certainly, any prior history of a *Batson* violation in a previous trial in the same case, by the very same district attorney, would "bear upon the issue of racial animosity" and is a circumstance to be considered, which is precisely what happened in this case. District Attorney Evans' prior history of *Batson* violations was clearly considered by the trial court and the Mississippi Supreme Court.[8]

In so doing, the Mississippi Supreme Court noted that "*Foster* in no way involved a particular prosecutor's history of adjudicated *Batson* violations. Rather, the Court's holding in *Foster* hinged on several apparent misrepresentations made by the prosecution, evidenced by the record in conjunction with the prosecution's

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[8] J.A. 361-62.

troubling jury selection file, which had a shocking focus on race." J.A. 362-63.

As part of its inquiry, the Mississippi Supreme Court examined numerous exchanges found in the trial transcript concerning *Flowers III* history of *Batson* violations, contrary to the claims of the Petitioner. J.A. 373-77.[9] Petitioner's claim that the court failed to consider this history is simply untrue. The court specifically found "the trial court was presented with and rejected [Petitioner]'s present argument . . . [,]" and "the trial court certainly considered circumstances surrounding the previous trial as evidenced by its response to [Petitioner]'s *Batson* claim[.]" J.A. 374-77. Additionally, the court below expressly stated that, "[w]e do not ignore the historical evidence of racial discrimination in the previous trials in our consideration of [Petitioner]'s arguments. However, the historical evidence of past discrimination presented to the trial court does not alter our analysis, as set out in *Flowers VI*." J.A. 378-79. The Petitioner's request for the Court to automatically assume the district attorney violated *Batson* based upon his previous violation of *Batson* in Flowers' third trial is without precedential support and is thus devoid of legal merit.

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[9] The first quoted passage appears at Tr. 1734-35; the second quoted passage appears at Tr. 1739; the third passage appears at Tr. 1764-65; the fourth quoted passage appears at Tr. 1766-67; and the fifth and final quoted passage appears at Tr. 1787-89.

### B. The Lack Of Any Inferential Proof Of Racial Animus In This Case Is Distinct From That Found In Both *Miller-El* And *Foster*

Likewise devoid of merit is the Petitioner's claim that the challenged peremptory strikes in this case rise to the level of those this Court has previously held to be violative of *Batson*. This case simply does not involve evidence of racial animus such as multiple misrepresentations by the prosecution or a troubling jury selection file.

Acknowledging this fact, and relying on the Court's holding in *Foster* for guidance in adjudicating Flowers' *Batson* claim, the court below noted that in *Foster*,

> the prosecution's jury selection file was replete with documents referencing race, including: (1) copies of the jury venire list on which the names of each black prospective juror were highlighted in green, with a legend indicating that the green highlighting "represents Blacks"; (2) a draft of an affidavit prepared by an investigator at the request of the prosecutor, comparing black prospective jurors and concluding, "If it comes down to having to pick one of the black jurors, [this one] might be okay"; (3) handwritten notes identifying three black prospective jurors as "B# 1," "B# 2," and "B# 3"; (4) a typed list of qualified jurors with "N" (for "no") appearing next to the names of all five black prospective jurors; (5) a handwritten document titled "definite NO's" listing six names, including the names of all five qualified black prospective jurors; (6) handwritten document titled "Church of Christ"

> with notation that read: "NO. No Black Church"; and (7) the questionnaires filled out by several of the prospective black jurors, on which each juror's response indicating his or her race had been circled. [*Foster*] at 1744.

J.A. 363-61. Not one of these examples of racial animus, or any others for that matter, is present in this case.

Following the Court's GVR[10] of the case, the Mississippi Supreme Court looked to the Court's opinion in *Foster* for guidance in considering "other issues that might place our original opinion in *Flowers [VI]* in error." *Id.* In so doing, the court correctly noted that *Batson's* third step, at issue here, "turns on factual determinations, and, 'in the absence of exceptional circumstances,' requires deference to state court factual findings unless we conclude that they are clearly erroneous." *Id.* at 1119 (¶ 91) (quoting *Foster*, 136 U.S. at 1747 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008))). The court then addressed Petitioner's argument that it failed to follow *Foster's* "totality-of-the-circumstances-approach," by omitting the prosecutor's "well-documented history from its assessment of the credibility of his facially neutral reasons." J.A. 368-69. In so doing, the court noted that "'[I]n considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.'" J.A. 372 (quoting *Foster*, 136 U.S. at 1748). The court correctly noted that "determining whether invidious discriminatory purpose was a motivating factor demands

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[10] (Grant, vacate, remand order). *Flowers v. Mississippi*, 136 S.Ct. 2157 (2016).

a sensitive inquiry into such circumstantial evidence of intent as may be available." *Id.* (quoting *Foster*, 136 U.S. at 1737, 1748) (citing *Arlington Heights*, 429 U.S. at 266).

The Mississippi Supreme Court correctly followed the mandate of *Batson* and its progeny in recognizing that "all of the circumstances that bear upon the issue of racial animosity must be consulted." J.A. 364-65 (citing *Foster*, 136 S.Ct. at 1748 (quoting *Snyder*, 552 U.S. at 478)). "*Foster* did not alter the great deference given to trial judges" and the "third step of *Batson* turns on factual determinations, and, 'in the absence of exceptional circumstances,' we defer to state court factual findings unless we conclude that they are clearly erroneous." J.A. 365 (citing to *Foster*, 136 S.Ct. at 1747 (quoting *Snyder*, 552 U.S. at 477)).

The court below was correct in acknowledging that "step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility." J.A. 371 (citing to *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)). Such an evaluation concerns the trial court's "determinations of credibility and demeanor" which are within the province of the trial judge. J.A. 372.

Just as there was no "troubling" jury file in this case, as in *Foster*, there was likewise no "evidence of a specific policy of past discrimination" as was the case in *Miller-El II*, 545 U.S. at 253, 263. The Mississippi Supreme Court expressly considered District Attorney Evans' two "past adjudicated *Batson* violations" and held they did not "overcome the deference owed to the trial judge's factual findings on which the [c]ourt's

affirmance relies." J.A. 377-78. Nothing in that determination is violative of this Court's holding in *Batson*.

### C. The Mississippi Supreme Court's Holding Regarding The Trial Court's Comparative Analysis Of Petitioner's *Batson* Claims Does Not Constitute Error

Additionally, the court below committed no error in adjudicating Flowers' *Batson* claim as it relates to Petitioner's claims of "(1) disparately questioning African-American jurors as compared to white jurors; (2) responding differently to African-American jurors' voir dire answers as compared to answers of white venire members; and (3) mischaracterizing the voir dire responses of African-American jurors." J.A. 378. The comparative analysis conducted by the trial court was consistent with *Batson* and its progeny. Thus, the decision of the Mississippi Supreme Court on this issue cannot be said to be clear error.

As the Court held in *Miller-El II* regarding comparative analysis, "[m]ore powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). There, the Court declined to "develop a comparative juror analysis" but "did note that the prosecution's reasons for exercising peremptory strikes against some black panel members appeared equally on point as to some white jurors who served." *Id.* The trial court did conduct a comparative analysis

in this case and, as will be detailed *infra*, found the State's race-neutral reasons to be valid and not the product of pretext. Additionally, the trial court found there was no disparate treatment. The Mississippi Supreme Court following its examination of the record, made the same determination.

"If a prosecutor's proffered reason for striking a panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Rhoades v. Davis*, ___ F.3d ___, 2019 WL 334890 *14 (5th Cir. 2019). "The narrow focus in this inquiry" then, is squarely on "the actual, contemporary reasons articulated for the prosecutor's decision to strike a prospective juror" and when a prosecutor gives a facially race-neutral rationale for striking a black juror, "a reviewing court must 'assess the plausibility of that reason in light of all evidence with a bearing on it.'" *Id.* (quoting *Miller-El*, 545 U.S. at 251-52). Appellate courts then, are tasked with testing "the veracity" of "timely expressed neutral reasons." *Id.*; *United States v. Thompson*, 735 F.3d 291, 297 n.14 (5th Cir. 2013) ("This court has routinely found demeanor to be a race-neutral justification."); *United States v. Jimenez*, 77 F.3d 95, 100-01 (5th Cir. 1996) (accepting prosecutor's distinction between a Hispanic juror who was struck due to potential bias against the prosecution because a close relative was convicted by federal prosecutors and two seated jurors with DWI convictions where those convictions did not involve federal prosecutors).

Flowers alleges that disparate questioning between black jurors and other jurors warrants relief in the case *sub judice*. Pet. 44. The record does not support that assertion. As the Mississippi Supreme Court held in finding "no evidence of discrimination based on the number of questions asked alone,"[11] there were valid race-neutral reasons which justified the district attorney asking more questions of certain black venire members. The record clearly shows this was not disparate questioning but rather a means of following up on a "juror's knowledge of the case, whether they could impose the death penalty, and whether certain relationships would influence their decision or prevent them from being fair and impartial."[12] This was not a violation of *Batson*.

**Individual Venire Members**

The district attorney offered the following reasons for exercising peremptory strikes against the five African-American jurors. Juror 14, Carolyn Wright, was sued by Tardy Furniture after the murders. Wright also worked with Flowers' father, Archie. J.A. 209.

Juror 44, Tashia Cunningham, stated in her jury questionnaire that "she would not consider death or life." Cunningham then vacillated "back and forth in questioning on what her opinion was on the death penalty," so much so that the State "could not keep her."

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[11] J.A. 381.

[12] J.A. 381.

J.A. 220. Cunningham also worked with Flowers' sister, Sherita Baskin, on an assembly line but was less than forthright about the circumstances of this working relationship. For example, Cunningham stated that she "worked on the complete opposite end of the line" from Baskin, however, Cunningham's HR representative testified during voir dire that Cunningham and Baskin worked "right next to" each other "practically every day." *Id.*

Juror 45, Edith Burnside, stated that Flowers was "very good friends with both of her sons." J.A. 226. Burnside also was sued by Tardy Furniture. *Id.* Finally, Ms. Burnside "at one point said she could not judge" Flowers. J.A. 227. Burnside stated the "fact that she knew the [Petitioner] so well, he had visited in her home, and was such close friends with her sons might affect her decision in this case." *Id.*

Juror 53, Flancie Jones, was related to Flowers. "She admitted that she was related—she was cousin—or the Defendant's sister, Angela Jones, is her niece." J.A. 229. Additionally, Jones was approximately thirty minutes late for court on two separate occasions. *Id.* Jones also was "back and forth all over the place on her opinion about the death penalty." She stated during voir dire that she was in favor of the death penalty, yet on her jury questionnaire stated she was strongly against the death penalty. When asked about that inconsistency, Jones admitted to lying on the questionnaire. *Id.*

Finally, Juror 62, Diane Copper, worked with Flowers' father and worked with Flowers' sister at a shoe store. J.A. 234. She testified "that she leaned toward favoring [Flowers'] side of the case." *Id.* Thus, the record supports the district attorney's need to ask additional questions of these venire members and their testimony supports the State's race-neutral reasons for their being struck. Petitioner's strategy at trial was to rebut the State's race-neutral reasons by claiming that the State engaged in disparate treatment by tendering white jurors who had the same characteristics as the black jurors struck. However, as the trial court correctly found, Flowers' claims of disparate treatment were totally unsupported by the record. Accordingly, neither the Mississippi Supreme Court nor the trial court committed error regarding Petitioner's claims of disparate treatment.

There simply was no disparate treatment of the individual venire members in this case. Even a cursory review of the record demonstrates that the State's articulated reasons for the strikes was not racially motivated. Each juror was questioned based on their respective responses and the race-neutral reasons provided are commensurate with the mandate of this Court's holding in *Batson* and its progeny.

### 1. Carolyn Wright

The Petitioner claims there was disparate treatment regarding venire member Carolyn Wright. Pet. 49. The Mississippi Supreme Court held the strike of

Wright to be proper noting that "Wright had worked with Flowers' father, she knew thirty-two of the potential witnesses, and she had been sued by Tardy Furniture" and that she "wrote that she previously had served as a juror in a criminal case involving the 'Tardy Furniture trial.'" J.A. 385.

Wright worked with Flowers' father at, according to the trial judge, the "smallest Wal-Mart in existence." J.A. 385. In *Higgins v. Cain*, 720 F.3d 255, 268 (5th Cir. 2013), the Fifth Circuit held that a juror's familiarity with the defendant or his family is a race-neutral reason for a strike. Striking a juror who worked with the Petitioner or a member of his family is an accepted race-neutral reason for a strike. A juror's history of litigation with any of the parties or their attorneys is a valid race-neutral reason warranting a strike.

On rebuttal, the Petitioner claimed the State engaged in disparate treatment by failing to ask white jurors if they had ever been sued by Tardy Furniture. However, the record clearly shows that the State expressly noted that it checked every prospective juror on the list to see if anyone had been sued by Tardy, or had any sort of "run-in" with the store. Tr. 1772. Additionally, the trial court reiterated to Petitioner's counsel that the entire venire panel had been asked, one, if any of them had a charge account with Tardy; and two, if any of them had ever been sued by Tardy Furniture. That question, as the trial court clearly stated, "was not just asked of African-American jurors. . . ." Tr. 1773. When asked by the trial court whether any white

jurors tendered had been sued by Tardy Furniture, Petitioner's trial counsel responded, "no." Tr. 1765.

In rebuttal of the strike against Wright, Flowers also claimed the State tendered white Juror Pamela Chesteen, who was also an acquaintance with other witnesses and with the Flowers family. Tr. 1765. However, the record shows that Chesteen did not work with anyone in Flowers' family, as did Wright. The record also shows that the trial court inquired of Petitioner's counsel whether any white jurors tendered worked with Flowers' father. Petitioner's trial counsel responded, "no." Tr. 1765. The trial court, in denying the Petitioner's objection to the strike of Wright, found the State's reasons to be race-neutral, holding:

> So she had worked with Mr. Flowers's [sic] father. She has been sued by Tardy Furniture. I find those to be race neutral reasons. You are correct in pointing out that some of the other State—the other jurors that have been tendered by the State—some of these, you know, white jurors know some of these people. But I have not found, looking through my notes, any white jurors that worked with Mr. Archie at Wal Mart. I have not seen any indication that Tardy sued any of those. And so I think the State has offered race-neutral reasons, and I find that the Defense has failed to rebut the reasons offered by the State.
>
> * * *
>
> If—if the only reason the State offered was that she knows some of these Defense witnesses,

> then there might be something there. But the fact is knowing these Defense witnesses that you're intending to call, plus the fact that Tardy had to sue her, plus the fact that she worked with Archie, in my mind, creates race-neutral reasons for striking her. And that is the finding of this Court.

Tr. 1773-75.

The Mississippi Supreme Court's holding that Wright was properly struck is not error. Wright had been sued by Tardy Furniture. She worked with Flowers' father. These are both accepted race-neutral reasons. None of the other perspective jurors offered for comparison had been sued by Tardy and none had worked with Flowers' father, thus Petitioner's claim of disparate treatment must also fail. The decisions of the trial court and the Mississippi Supreme Court regarding Wright were not clearly erroneous and are in no way violative of the Court's holding in *Batson*.

**2. Tashia Cunningham**

The Petitioner claims error regarding the questioning of prospective juror Tashia Cunningham. Specifically, the Petitioner claims District Attorney Doug Evans' questioning of Cunningham constituted "disparate questioning and disparate investigation—and, quite likely, [was] an attempt to mislead the trial court." Pet. 48. The Petitioner is mistaken.

The court below considered Flowers' claims regarding Cunningham and held that "the blatantly

conflicting testimony of Cunningham . . . [regarding her work relationship with Flowers' sister, Sherita Baskin] was a race neutral basis for the State's challenge, as concern about a juror's honesty constitutes a race neutral reason." J.A. 396. The court further held that Cunningham's wavering answers concerning the death penalty constituted an acceptable race-neutral reason.[13] J.A. 396-97. A review of the record supports these determinations.

Regarding Cunningham's answers concerning the death penalty, the court below noted that, "[o]n her juror questionnaire, Cunningham marked that she had 'no opinion' on the death penalty but, on the very next question, she marked that she would not consider the death penalty under any circumstances." J.A. 396-97. As the court below noted, when questioned by the trial court regarding her opinion of the death penalty, "Cunningham first said she 'would not' consider the death penalty and that she 'did not believe in the death penalty.' She confirmed for the court three times that she would not consider the death penalty. However, as questioning continued, Cunningham wavered, saying she 'might' be able to consider it." J.A. 396-97. The record reflects that "Cunningham went back to her initial position that she did not think she could consider the death penalty" and then "when questioned by defense counsel . . . said that she could consider both life in prison and the death penalty." J.A. 397. Specifically, during individual voir dire, Cunningham stated that

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[13] *Davis v. Ayala*, 135 S.Ct. 2187, 2199-2201 (2015).

she was against the death penalty. However, she then equivocated on the issue:

Court: Would you or would you not be able to consider the death penalty? I mean, what's your view on even considering the death penalty?

A: I would not.

* * *

Court: Are—are you saying you would not consider it?

A: No, sir.

Q: Even if the law allowed it and the facts justified it, you just could not even consider it?

A: No, sir.

* * *

Q: So but again, just tell me again what your feelings are on the death penalty?

A: I don't believe in the death penalty.

Q: And would there be a possible—could you consider it?

A: I don't think so.

Q: You don't think so?

A: I don't think so.

Q: But there's—in our own mind, you might could—are you saying you could possibly?

A: I don't think so.

Q: See, I'm not asking you to make a—you know, you haven't heard anything. And all we want to know is whether you could consider that as a possibility—that as a sentencing possibility [. . .]

A: I might. I might. I don't know. I might.

Q: So you might be able to consider that?

A: (Nodding head).

Tr. 1293-95.

After the conclusion of this voir dire by the court, the State asked the question again:

Q: Could you consider the death penalty yourself if the facts justified it and the law allowed it?

A: I don't think so.

Tr. 1296.

Having doubts or reluctance to follow the law as well as providing inconsistent testimony is certainly a sufficient race-neutral reason warranting a strike.

Alternatively, Cunningham lied during voir dire. She repeatedly stated that while she worked with Flowers' sister on an assembly line, a sufficient reason

to justify her strike, the two did not work in close contact with one another but rather, "[s]he works at the front of the line, and I work at the end of the line." Tr. 987. However, Cunningham's quality control clerk, Crystal Carpenter, testified that she and Flowers' sister, in fact, worked "side by side," less than ten inches from each other nearly every day. Tr. 1328-29. Certainly, lying in your answers to voir dire questions is a sufficiently race-neutral reason for a strike. *Murphy v. Dretke*, 416 F.3d 427, 433 (5th Cir. 2005).

Regarding the allegation of disparate treatment of Cunningham, at trial Petitioner claimed the State tendered white Juror 30, Mr. Whitfield, who also had mixed feelings about the death penalty. Tr. 1778-79. However, as the trial court found, while Cunningham's statements were "all over the map," Mr. Whitfield's situa-tion was "greatly different [as . . . he] said from the beginning on his questionnaire that he generally favored the death penalty and could consider it." Tr. 1781-82. Petitioner also claimed that the State's decision to strike Cunningham based on the testimony of Cunningham's quality control representative (Crystal Carpenter) was pretext because the State failed to "verify" the woman's statements with documents, choosing instead to simply take her word for it. Tr. 1777. The court properly denied such argument, noting that Petitioner had presented no legal authority to support the claim that the State was required to prove Ms. Carpenter's sworn testimony was true. The trial court correctly held the "State had shown race-neutral reasons for that strike and the Defense . . . failed to

rebut that race-neutral reason that was given." Tr. 1782. However, as the court below noted, "[u]nlike Cunningham, Whitfield never said that he would be unable to impose the death penalty" and that "no white jurors survived for-cause challenges who had views on the death penalty comparable to Cunningham's views." J.A. 397-98.

The record clearly shows that Cunningham was struck because she lied about her working relationship with Flowers' sister and because of her wavering and vacillating testimony regarding the death penalty. Furthermore, as no white jurors were seated with the same characteristics, the basis for the strike was not pretextual. Thus, the holding of the Mississippi Supreme Court regarding the trial court's decision concerning the strike of Cunningham was not clearly erroneous and was consistent with *Batson*. Petitioner is entitled to no relief on this claim.

### 3. Edith Burnside

The Petitioner next claims error regarding the strike of Edith Burnside, albeit in a cursory fashion, arguing District Attorney Evans made false statements regarding this venire member.[14] Pet. 50. The

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[14] Petitioner makes numerous claims that District Attorney Evans made false representations to the trial court regarding reasons for his strikes. The Respondent disagrees and would submit that a valid, legitimate reason "is not a reason that makes sense, but [rather is] a reason that does not deny equal protection." *Purkett v. Elem*, 514 U.S. 765, 769 (1995). What is to be considered is the "genuineness of the motive" behind the racially neutral

Respondent submits the record demonstrates that Burnside, like Carolyn Wright, was also sued by Tardy Furniture. Additionally, although not apparent from the Petitioner's arguments, Burnside also equivocated on whether she could impose the death penalty:

> Court: And so I want to know if the facts justified it and the law allowed it, could you consider the death penalty as a sentencing possibility?
>
> A: [by Burnside]: That I don't think I could do. I don't know if I could do that [ . . . ] I don't—I don't know if I could consider it, sending anybody to death. I don't know if I could do that.

Tr. 1300-01.

The court continued to investigate the issue on voir dire:

> Q: And would you consider the imposition of the death penalty, if you were on the jury and it got to the second phase?
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> A: If I was on there, yeah, I guess I'd have to.

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reason as opposed to "the reasonableness of the asserted nonracial motive." *Id.* "To accept a prosecutor's stated nonracial reasons, the court need not agree with them. The question is not whether the stated reason represents a sound strategic judgment, but 'whether counsel's race-neutral explanation for a peremptory challenge should be believed.'" *Kesser v. Cambra*, 465 F.3d 351, 359 (9th Cir. 2006) (citing *Hernandez*, 500 U.S. at 365).

Q: So if the facts justified it and the law allowed it, you would consider it?

A: Yes.

Tr. 1301.

During individual voir dire by the State, the district attorney asked Ms. Burnside about an earlier statement she made in which she said she did not want to sit in judgment:

Q: When I was asking the questions the other day about jurors that could judge other people, you stated at that time that you could not judge anyone. Why did you state that?

A: Well, because I—you know, I prefer not to judge anyone. But when they come back and say could I be fair. My thing is I prefer not to judge anyone. But now, I will be fair.

Tr. 1305.

The State followed up on Burnside's vacillation and changed decision to "be fair" asking:

Q: So you've changed your mind, and you say now that you could judge someone; is that correct?

A: Well, basically, I haven't changed my mind. I just prefer not to be in a predicament where I have to judge somebody.

Q: So you still have a problem with judging someone?

A: I still have a problem with that.

Q: Would that problem be such that you would think about it if you were picked on a jury?

A: Well, I'd have to say yes.

Q: It would? So that might affect your judgment in this case; is that right?

A: It could, possibly, yes, sir.

Tr. 1306.

The State's reasons for striking Burnside were clearly race-neutral. A juror's views on the death penalty are a valid race-neutral reason for a strike.[15] A juror's reluctance to serve is also race-neutral reason appropriate for a peremptory challenge.

On rebuttal, the Petitioner erroneously claimed that only African-Americans had been asked whether they had been sued by Tardy Furniture. However, the record belies that allegation. Petitioner also argued Burnside testified she could be fair even though she had been sued. However, as the trial court noted, her promise to be fair was at odds with her apparent reluctance to serve, her reluctance to judge, and her belief that such reluctance would affect her judgment:

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[15] *White v. Wheeler*, 136 S.Ct. 456 (2015).

> She first stood up when the district attorney asked her if she could judge, and she said she could not. I have seen no white person that was left on this panel that responded in a similar fashion. And I've got a note here that said she stated that she'd preferred not to judge. Again, I don't have any notes that would indicate that there was any white person that said that. She was sued by Tardy Furniture. But I think the State has offered numerous race-neutral reasons for this strike, and there are not white jurors that were left on the panel that have the race-neutral reasons the State has offered for striking Ms. Burnside.

Tr. 1785-86.

The record supports the decision of the Mississippi Supreme Court regarding the strike of this venire member. The race-neutral reasons provided by the State were valid and were not the result of pretext. Additionally, no white jurors were seated who were sued by Tardy Furniture or who vacillated on the death penalty, as she did. This was not error, much less clear error, and Petitioner is entitled to no relief based on the strike of Burnside.

**4. Flancie Jones**

The Petitioner next makes another cursory argument concerning the strike of Flancie Jones saying District Attorney Evans gave "demonstrably false"

testimony concerning Jones.[16] Pet. 51. Flowers claims Evans statements regarding Jones' familial relationship to Petitioner's family was false. *Id.* To be clear, the State provided three race-neutral reasons for striking Jones.

First, she was twice late to court, stating she didn't like to get up in the morning. Tr. 1786. Lack of respect for court proceedings is a race-neutral reason supporting a strike. *United States v. Matthews*, 803 F.2d 325 (7th Cir. 1986) (juror arrived late, indicating a lack of commitment to the importance of the proceedings). Second, Jones is indeed related to Flowers. The relationship appeared to be through two different veins, albeit both through marriage. Both the State and Petitioner categorized that relationship differently with the trial court describing the relationship as follows:

> She said that Angela Ward Jones was married to Mark Jones, and she said that was her nephew. She's not directly related to Mr. Flowers. She's related by marriage to Mr. Flowers's [sic] sister. And then Hazel Jones is her husband's brother's wife and, you know, that's another family connection there.

Tr. 1789-90.

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[16] Petitioner also claims Evans provided "demonstrably false" testimony for "four of the five black panelists he struck." Pet. 51. However, as demonstrated *supra*, these other panelists, as well as Jones, were struck using valid race-neutral reasons, reasons which were not pretextual. Petitioner's false testimony claim and his *Batson* claim are devoid of legal merit.

A familial relationship to the Petitioner is certainly a race-neutral reason justifying a strike. *See Higgins v. Cain*, 720 F.3d 255, 268 (5th Cir. 2013) (juror's familiarity with the defendant or his family is a race-neutral reason for a strike). Additionally, striking a venire member who knows a defendant or his family is a valid race-neutral reason justifying a peremptory strike. *See United States v. Lewis*, 593 F.3d 765, 770 (8th Cir. 2010) (prosecutor's reasoning that two jurors were struck because they personally knew a defense witness was a valid race-neutral reason); *United States v. Williamson*, 53 F.3d 1500, 1509-10 (10th Cir. 1995).

Third, Jones admitted to lying on her jury questionnaire. There, she indicated her strong opposition to the death penalty but during voir dire by the trial court, however, Jones testified that she had "an open mind," and that she "could consider both" sentencing options. Tr. 1362. The State investigated this clear discrepancy during voir dire:

Q: Okay. And I think on your questionnaire, you said you were strongly against the death penalty.

A: I guess I'd say anything to get off.

Q: Okay. Well, are you saying that you didn't tell the truth?

A: No, that's not that. It's just that if I didn't have to be here, I wouldn't want to be here.

> Q: Well, I want to know when you put down you were strongly against the death penalty—
>
> A: I was trying not to be—I—really and truly, I don't want to be here. I'll say it like that.

Tr. 1364.

Equivocation and lying are independent, valid race-neutral reasons justifying the strike of a member of the venire. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Hernandez v. New York*, 500 U.S. 352, 369, 111 S.Ct. 1859 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504 (1985)). In addition to prevarication, a juror's views on the death penalty are also valid race-neutral reasons supporting a strike.

At trial, Petitioner's counsel argued the State engaged in disparate treatment by striking Jones for lying on her questionnaire, but not striking Juror 51, Mr. Huggins, who initially stated that he had no knowledge of the Flowers case, but then later admitted to being in the 2007 voir dire panel. Tr. 1791. The trial court rejected Petitioner's argument, holding that Jones was the only juror, black or white, who admitted to lying to the court for the purpose of being struck from the venire:

> The court was somewhat dumbfounded—and this is the only juror of any race that made this statement. But she got up here from this

> witness stand and said, I lied on my questionnaire. And I think that, in and of itself, is a race neutral reason. She said, I lied. You know, I don't want to be here. And so I lied. And so, you know—I don't—she's totally been dishonest in something that she filed with this Court, and that is race neutral. There's not another person that has said, I lied on my questionnaire.

Tr. 1789.

Referring to Juror 51, whom the State did not strike, the trial court recognized that Huggins initially stated he had not been involved in the case, only to later volunteer that he had been in the venire panel in one of Flowers' previous trials. The obvious distinction in this instance is that the court recognized that Huggins never admitted to intentionally lying, as Jones had.[17] From this particular set of events, it is presumed that Huggins forgot or failed to understand the initial question. At any rate, Juror 51's response concerned his familiarity with the case and not with whether he

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[17] Defense counsel questioned Huggins about the fact that he had been summonsed as a juror for the Flowers case in 2008, and that he "sat through a similar process" but was excused because he was "so far down in the list" and wasn't needed. Tr. 1727. Counsel for Petitioner asked Huggins if he was mistaken when he told the trial court that the first time he'd heard anything about this was when he reported for the instant summons. Mr. Huggins responded, "Well, it happened in '96. I mean what I meant was since then I have heard a little off and on when I would come in, you know, into home." Tr. 1728.

was for or against the death penalty. Rejecting claims of disparate treatment, the trial court properly noted:

> Well, I have made my ruling, but I'll reiterate that she [Jones] said up here from this stand, "I lied on that questionnaire." I never did hear Mr. Huggins say he lied, and you didn't ask him. You know, you didn't ask him when he was called back in, did you lie when you said that? So I can't know his frame of mind of why he didn't originally point out he was in the original voir dire. But he clearly did not say that he lied. And again, the statement on the questionnaire [that she lied about was totally different] she said she could not under any circumstances consider the death penalty. And now she, in court, is saying that she can. That is vastly different. And also, again, these relationships she's got. I do not have any white juror that has been allowed to remain on that had those issues.

Tr. 1792.

The Mississippi Supreme Court's holding regarding the strike of Jones was clearly based on valid race-neutral reasons devoid of any pretext and was thus, not error, much less clear error. Flowers is entitled to no relief on this assignment of error.

### 5. Diane Copper

Finally, Petitioner claims error regarding venire member Diane Copper. However, the gist of Petitioner's claims with regard to Copper is his assertion that

District Attorney Evans, in voir dire, was "fishing" for "facially neutral pretext" and was "pushy" while questioning Copper regarding her work relationship with Flowers' sister. Pet. 46-47.

The State offered four race-neutral reasons for striking Copper, which the court below noted were that: "'1) she had worked with Flowers' father and sister; (2) she knew several members of the Flowers family; (3) she said she "leaned toward" Flowers' side of the case due to her relationships with the Flowers family; and (4) she knew several defense witnesses.'" J.A. 386. The Petitioner argued pretext, "asserting that the State had not challenged white jurors connected to people involved in the case." *Id.* Flowers also claimed the State did not attempt to rehabilitate Copper after "she said [sic] leaned toward Flowers." *Id.* The trial court, as the Mississippi Supreme Court noted, held the State's race-neutral reasons were valid, "concluding that Copper's relationships were distinguishable from those of the white jurors who were not challenged and recognizing that other jurors had not said they favored Flowers as Copper did." *Id.*

The record reflects that Copper worked with Flowers' father at Wal Mart, and with Flowers' sister at Shoe World. Tr. 1794. This was a sufficient race-neutral reason to strike her from the jury.[18] Additionally, while Copper stated she could be fair, she also testified that she would lean towards voting in favor of Flowers' family. Copper stated that "it's possible" the fact that she

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[18] *Higgins v. Cain*, 720 F.3d 255, 268 (5th Cir. 2013).

knew many of Flowers' family members could affect her and make her "lean toward [Petitioner]." Tr. 1404-06. The State asked Copper if those relationships would, "make it to where you couldn't come in here and, just with an open mind, decide the case, wouldn't it?" To which, Copper answered, "[c]orrect." Tr. 1407. Both Copper's preference for one side of the case and her equivocation between fairness and bias, were sufficient race-neutral reasons justifying a peremptory strike.

Additionally, Copper agreed with defense counsel's statement, "I get the impression you're saying that you'd rather not be a juror." Tr. 1409. Reluctance to serve is certainly a sufficiently race-neutral reason to lodge a peremptory challenge. Just as with Wright and Cunningham, Petitioner's trial counsel attempted to argue disparate treatment, yet conceded that none of the white jurors struck worked with a member of Flowers' family as Copper did. The trial court rejected Petitioner's claim of disparate treatment, holding:

> . . . she had stated that she worked with Archie at Wal-Mart, and she worked with Cora at Shoe World. She's had close working relationships with those two individuals in Mr. Flowers's [sic] family. I see that greatly different than No. 17, Ms. Chesteen, who was the bank teller and has people that's come into the bank. There's no indication that Ms. Chesteen has ever worked with Archie Flowers, ever worked with Cora or anybody else. And so there is a huge difference between the—

> S-6 with Ms. Copper and any white juror that was left on the panel.

Tr. 1796-97.

The trial court held there was a distinct difference between being acquainted or friendly with the victims, the Petitioner, or members of Flowers' family and working with the Petitioner's father and sister. Nearly all the jurors had some type of connection to the individuals involved in this case. Petitioner's claim of disparate treatment fails because the State accepted no juror, black or white, who worked with the victims, the Petitioner, or the parties' families.

Petitioner argued the State engaged in disparate treatment of Copper by accepting Jurors 40 and 50, each of whom stated that they had formed an opinion about the case, albeit undisclosed opinions, yet struck Copper without ever asking her if she could lay that aside. Tr. 1797. However, the record shows otherwise. Ms. Copper did indeed state that she could be fair, at first suggesting she could set aside her feelings. However, she equivocated stating she would lean toward Flowers' family. Such statements were not made by Jurors 40 and 50, as the trial court noted:

> Court: Well, the Court—neither No. 40 or No. 50 stated that they were leaning towards the Flowers' family in this case. And she did. There—there wasn't anything for them to rehabilitate because

> they didn't say they were leaning towards the Flowers family.
>
> * * *
>
> . . . . She said, "I would tend to lean toward favoring the family." And that—that is different than somebody that expresses no statement to that.

Tr. 1796-98.

Petitioner's *Batson* claim regarding this strike was properly adjudicated by the Mississippi Supreme Court, as the reasons offered by the State were race-neutral and were not the product of pretext. Additionally, there was no disparate treatment of Copper. The Mississippi Supreme Court's holding in this regard does not constitute clear error and complies with this Court's holding in *Batson*.

## CONCLUSION

The Mississippi Supreme Court reviewed the trial court's holding on the five challenged peremptory strikes and scrutinized the trial court's comparative analysis of the Petitioner's claims, and in so doing held the State's numerous and valid race-neutral reasons were not violative of *Batson* and were not pretextual. The record supports this holding.

None of the white jurors accepted by the State worked with a member of Flowers' family. None of the

white jurors accepted by the State were related, by blood or marriage, to Flowers. None of the white jurors accepted by the State equivocated on the death penalty. None of the white jurors accepted by the State admitted to lying in order to get off the jury. None of the white jurors accepted by the State lied about their opinion on the death penalty; none lied about their work relationship with a member of Flowers' family. None of the white jurors accepted by the State admitted to lying to the court. None of the white jurors accepted by the State had ever been sued by the victim's company. None of the white jurors accepted by the State were against the death penalty. The Petitioner failed to demonstrate purposeful discrimination at trial and on direct review with the Mississippi Supreme Court. He has likewise failed to satisfy his burden on this issue with this Court.

The State Respondent submits the holding of the Mississippi Supreme Court, that the State did not engage in purposeful racial discrimination during jury selection, and that Flowers' rights flowing from *Batson* were in no way violated, was not clearly erroneous. The Mississippi Supreme Court conducted its own painstaking analysis of the trial court's detailed findings and did not err in its application of *Batson* to this case. Petitioner's *Batson* claims must therefore fail.

For the above and foregoing reasons, the writ of certiorari should be dismissed in the instant case. The decision of the Mississippi Supreme Court concerning

Flowers' conviction of capital murder and sentence of death should be affirmed.

Respectfully submitted,

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